

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

JUL 21 11 37 AM '95

MM Docket No. 95-110

In the Matter of

Amendment of Section 1.420(f)  
of the Commission's Rules  
Concerning Automatic Stay of  
Certain Allocations Orders

## NOTICE OF PROPOSED RULE MAKING

Adopted: July 10, 1995;

Released: July 21, 1995

By the Commission:

Comment Date: August 28, 1995

Reply Comment Date: September 12, 1995

## I. INTRODUCTION

1. We initiate this proceeding on our own motion, pursuant to Section 1.3 of the Commission's rules, to improve Commission procedures governing proposals to amend the FM Table of Allotments and the Television Table of Allotments. Specifically, we propose to delete that portion of Section 1.420(f) of our rules, 47 C.F.R. § 1.420(f), which provides for an automatic stay, upon the filing of a petition for reconsideration, of any Commission order modifying an authorization to specify operation on a different channel. The purpose of this proposed amendment is to remove an apparent incentive for the filing of petitions for reconsideration that are largely without merit and to expedite provision of expanded service to the public.

## II. DISCUSSION

2. Section 1.420(f) provides, in pertinent part:

... The filing of a petition for reconsideration of an order modifying an authorization to specify operation on a different channel shall stay the effect of a change in the rules pending action on the petition.

3. The automatic stay provision applies to proposals to amend the TV or FM Tables of Allotments where the Commission has modified the authorization of the petitioner or another licensee or permittee to specify operation on a different channel. The provision has been applied both to situations where the petitioner's own authorization is being modified to operate on a different channel, and to situations where the authorization of a licensee or

permittee other than the petitioner must be modified to a different channel in order to accommodate a proposed allotment change. In the latter situation, the licensee or permittee whose authorization could be modified is notified of the pending proceeding and ordered to show cause, if any, why the modification should not be approved.<sup>1</sup>

4. Although Section 1.420(f) refers only to petitions for reconsideration, the staff has also applied the automatic stay to orders challenged by applications for review.<sup>2</sup> Our proposal to delete the automatic stay provision for petitions for reconsideration would also eliminate automatic stays in the context of applications for review.

5. The automatic stay was adopted by the Commission in 1975 as part of a provision that requires service of petitions for reconsideration in proceedings for amendment of the FM and TV Tables of Allotments on any licensee or permittee whose authorized frequency could be changed. In addition to the automatic stay provision cited above, Section 1.420(f) provides:

Petitions for reconsideration and responsive pleadings shall be served on parties to the proceeding and on any licensee or permittee whose authorization may be modified to specify operation on a different channel, and shall be accompanied by a certificate of service.<sup>3</sup>

Thus, it is apparent that the automatic stay was intended to help ensure that affected parties have the opportunity to comment before proposed modifications to their authorizations become effective.

6. Our intent in proposing to delete the automatic stay provision is to discourage parties from filing meritless petitions for reconsideration or applications for review that delay implementation of improved broadcast service. It is our experience that parties increasingly are filing challenges to approvals of their competitors' proposals to improve service, thereby triggering the automatic stay. Only a very small percentage of these petitions or applications for review are ultimately successful. The automatic stay prohibits licensees from constructing modified facilities authorized by the Commission until final resolution of any outstanding petition for reconsideration or application for review,<sup>4</sup> or until the stay is lifted. The automatic stay provides an incentive for parties to challenge agency approval of a competitor's modification proposal simply to forestall institution of new competitive service. These petitions cause unjustifiable expense for parties and absorb valuable staff resources that might otherwise be directed to resolution of new proposals to improve broadcast service.

7. The automatic stay provision can result in substantial delay in commencement of construction and provision of expanded service to the public. Elimination of the automatic stay would facilitate implementation of improved service to licensee communities, thereby promoting more efficient use of broadcast spectrum and resulting in significant public interest benefits. Because Section 1.420(f) will continue to require that petitions for reconsideration be served on any licensee or permittee whose authorization

<sup>1</sup> See 47 U.S.C. § 316(a); 47 C.F.R. § 1.87.

<sup>2</sup> See *Arlington, TX*, 6 FCC Rcd 2050, 2051 n.2 (1991).

<sup>3</sup> 47 C.F.R. § 1.420(f).

<sup>4</sup> See, e.g., *Arlington, TX*, *supra* n.2.

could be modified, the rights of these interested parties to be affirmatively informed of actions potentially affecting their interests will continue to be protected.

8. Elimination of the automatic stay, while allowing licensees to commence construction and operation of their modified facilities, would not prejudice final resolution of any challenges to the initial staff decision. Licensees who proceed, where feasible, to construct and operate new facilities in instances in which a petition for reconsideration or application for review is pending bear the risk of an adverse final decision, and must take whatever steps are necessary to comply with the final order. Moreover, the Commission retains the authority to impose a stay in individual cases where circumstances warrant.<sup>5</sup>

9. We propose both to eliminate the automatic stay in prospective cases, and to lift the stay with respect to any petitions for reconsideration or applications for review pending as of the effective date of the Report and Order in this proceeding. We believe that lifting the stay in pending cases will further our objective of expediting provision of improved service to the public. We invite comment on this second aspect of our proposal in particular, as well as on our general proposal to eliminate the automatic stay.

### III. ADMINISTRATIVE MATTERS

10. *Ex Parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

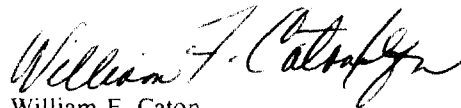
11. *Comment Information.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 28, 1995** and reply comments on or before **September 12, 1995**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

12. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document, set forth in the Appendix hereto. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the

Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.*, (1981)).

13. *Additional Information.* For additional information regarding this proceeding, contact Kim Matthews, Mass Media Bureau, Policy and Rules Division, (202)739-0774.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton

Acting Secretary

### APPENDIX

#### Initial Regulatory Flexibility Analysis

**I. Reason for Action:** This proceeding was initiated to improve Commission procedures governing proposals to amend the FM and TV Tables of Allotments.

**II. Objectives of the Action:** The actions proposed in the *Notice* are intended to reduce the workload in the Allocations Branch of the Policy and Rules Division of the FCC's Mass Media Bureau by eliminating an apparent incentive to challenge agency approval of another station's modification proposal.

**III. Legal Basis:** The proposed action is authorized under sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303.

**IV. Reporting, Record-keeping and Other Compliance Requirements:** None.

**V. Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rule:** None.

**VI. Description, Potential Impact and Number of Small Entities Involved:** Approximately 11,000 existing television and radio broadcasters of all sizes may be affected by the proposals contained in this *Notice*.

**VII. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** The proposals contained in this *Notice* do not impose additional burdens on small entities.

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth above. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

<sup>5</sup> See 47 C.F.R. §§ 1.102(b), 1.106(n), and 1.115(h).